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No. 98-594

In the Supreme Court of the United States

OCTOBER TERM, 1998

DON LEE DISTRIBUTOR, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the National Labor Relations Board's finding that a portion of the unfair labor practice complaint, alleging that petitioners had engaged in unlawful joint bargaining without the Union's consent, was timely under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b).

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National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 8(a)(5), 29 U.S.C. 158(a)(5) 5, 7, 9

§ 9(b), 29 U.S.C. 159(b) 2

§ 10(b), 29 U.S.C. 160(b) 9, 11, 12, 13, 17

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 145 F.3d 834. The decision and order of the National Labor Relations Board (Pet. App. 24a-39a) and the decision of the administrative law judge (Pet. App. 40a-105a) are reported at 322 N.L.R.B. 470.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1998. A petition for rehearing was denied on July 10, 1998 (Pet. App. 106a-107a). The petition for a writ of certiorari was filed on October 8, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners are six wholesale beer distributors operating in the Detroit, Michigan, metropolitan area. Pet. App. 3a, 41a. Petitioners' employees are represented by Respondent Local 1038, International Brotherhood of Teamsters (Union). The workforce employed by each petitioner constitutes a separate bargaining unit under Section 9(b) of the National Labor Relations Act, 29 U.S.C. 159(b). Pet. App. 3a, 42a-44a. In January 1990, petitioners withdrew from a multiemployer association and retained West Coast Industrial Relations Association, Inc. (West Coast), a labor-relations consulting firm, as their bargaining representative. *Id.* at 3a-4a, 25a n.2, 26a, 43a-44a. Fred Long, an official of West Coast, advised petitioners to enter into a "mutual aid pact." *Id.* at 4a, 44a. Accepting this advice, petitioners signed a mutual aid pact on January 18, 1990. That pact provided, in relevant part:

> 1. Each Distributor shall enter into its own Agreement with the Union. Nothing contained herein shall be construed to reflect a multi-employer association nor create a multi-employer unit. This document reflects a coordinated bargaining effort among individual and independent Distributors.
>
> 2. Each Distributor shall share costs and expenses of Fred R. Long and his associates who shall represent the Distributors['] bargaining efforts with the Union . . .
>
> * * *

> 7. Distributors agree to the establishment of the minimum objectives * * * for a new Collective Bargaining Agreement which can only be changed by a majority vote of the participating Distributors.
>
> 8. In the event any Distributor is in breach of this Agreement or negotiates directly with the Union * * * or agrees to settle on terms and conditions in excess of those listed in item 7 herein above, that Distributor * * * shall * * * pay to each of the other Distributors a penalty fee of $400,000 to each.

Id. at 4a-5a, 6a, 44a-45a, 48a. Among the 22 "minimum objectives" for a new collective bargaining agreement referred to in paragraph 7 of the mutual aid pact were such matters as "[e]liminate eight (8) hour minimum/maximum day," "[r]emove load limit," "[m]anagement rights clause," "[r]eduction in wages," and "[n]o restrictions on number of part-time employees." *Id.* at 5a-6a, 27a, 45a-47a.

b. The existing collective bargaining agreement was scheduled to expire on May 1, 1990. Pet. App. 6a, 44a. On March 6, 1990, Patrick Jordan, an attorney for West Coast, informed Robert Knox, president of the Union and its chief negotiator, that petitioners were "prepared to meet with you jointly and engage in concurrent negotiations." *Id.* at 67a; see also *id.* at 6a. Knox replied that he had not agreed to meet jointly or to engage in concurrent negotiations with petitioners and that he did not "even know what that meant." *Id.* at 6a, 67a.

The parties held an initial meeting on March 27, 1990. In view of the expressed reluctance of Knox to participate in "joint" or "concurrent" bargaining, Long told Knox that he could conduct a bargaining session for one of the distributors separately but would thereafter

insist on identical contract terms for each of the other five. Pet. App. 7a, 68a; see also *id.* at 79a. Knox instead agreed to try the joint bargaining approach and "see how it progressed." *Id.* at 7a, 68a.

At the March 27 meeting, Knox asked Long whether petitioners had entered into any kind of mutual aid pact. Pet. App. 7a, 54a. Long replied that the possible existence of a mutual aid pact was "none of his business and that it was not relevant to bargaining." *Ibid.* Long also stated that petitioners had not pledged to negotiate exclusively through him and that they could "retain someone else without penalty." *Id.* at 7a, 56a-57a.

The parties exchanged initial contract proposals on April 18, 1990. Long presented the Union with six identical proposals, one for each distributor. Pet. App. 7a. That circumstance prompted Knox to ask whether there was "an association or other collective understanding" among petitioners. 145 F.3d at 839[1]; see also Pet. App. 54a. Long refused to answer, stating that "that wasn't an appropriate subject for bargaining." Pet. App. 7a, 54a. When the question again arose at a May 22 negotiating session, Long gave a "somewhat evasive answer" which suggested that "certain [d]istributors could well end up agreeing to different contract terms." *Id.* at 8a.

At bargaining sessions held in late June and early July 1990, the Union began to insist on separate bargaining for each distributor. Pet. App. 8a, 68a-69a, 82a-83a. When the Union made proposals that addressed issues unique to two of the distributors, however, all six distributors responded with identical counter-

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[1] The cited passage from the officially reported decision of the court of appeals has been omitted in the printing of the appendix to the petition. See Pet. App. 7a.

proposals. *Id.* at 8a-9a, 79a-80a. On August 8, Knox asked Chris Thomas, an associate of Long, for all documents showing the relationship between West Coast and petitioners. Thomas refused to honor that request, stating that the documents were confidential. *Id.* at 9a, 54a.

On September 11, 1990, West Coast transmitted to the Union a "final offer" which made clear that petitioners were presenting "complete and identical" offers. Pet. App. 9a. At the next bargaining session on September 20, Knox asked whether there was "a written or oral document that binds you distributors together in any way." Officials of two distributors stated in response that there was no pact of any kind among petitioners. *Id.* at 9a, 54a.

On January 14, 1991, after several further unsuccessful bargaining sessions, Thomas sent a letter to Knox stating that negotiations were at an impasse. Pet. App. 9a-10a. On January 30, petitioners simultaneously notified the Union that they would unilaterally implement the non-economic portion of their final offer on February 7, 1991. *Id.* at 10a. Petitioners thereafter did so on that date. *Id.* at 48a.

c. On April 3, 1991, the Union filed a charge with the National Labor Relations Board alleging that petitioners had violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), by bargaining in bad faith and by unilaterally implementing new terms and conditions of employment on February 7, 1991, in the absence of a bargaining impasse. Pet. App. 11a-12a, 40a-41a n.1, 48a.

On June 20, 1991, after an investigation, the Regional Director declined to issue a complaint against petitioners based on a theory that they had bargained in bad faith by engaging in multiemployer bargaining

without the Union's consent. Pet. App. 12a, 49a. On the evidence then before him, which did not include the mutual aid pact, the Regional Director found "no evidence that the Employers wished to change the scope of the six individual units or combine them into one unit," and "[no] evidence that, in the event an overall agreement is reached * * * the Employers intend not to bargain individually over issues which might pertain to each respective company." *Id.* at 12a. Instead, the Regional Director found that petitioners had engaged in permissible "bargain[ing] in a group with a single representative of their choice * * * for identical language in their collective bargaining agreement." *Ibid.* The Regional Director did issue a complaint against petitioners, however, alleging that the February 7, 1991, unilateral changes had been implemented in the absence of a bargaining impasse. The complaint was issued on July 26, 1991. *Id.* at 13a, 49a.

In the meantime, on July 12, 1991, the parties conducted another bargaining session. Steve Wolock, a Union attorney, asked for the production of any document "that spelled out the employers' relationship to each other for purposes of collective bargaining." He also specifically asked whether "there were any penalty provisions amongst the distributors." Pet. App. 10a, 54a. Thomas admitted for the first time that there was an agreement among the distributors, but he declined to produce it on the ground of attorney-client privilege. *Id.* at 10a, 54a-55a.

The Union appealed the Regional Director's refusal to issue a complaint against petitioners based on an unlawful multiemployer bargaining theory. On July 6, 1992, Long wrote a letter to the Board's Office of Appeals in which he stated that, while petitioners had entered into a "mutual aid pact," the pact was solely for

the purpose of sharing the cost of negotiations and contained no provision "that would restrict their bargaining." The Office of Appeals subsequently denied the Union's appeal. *Id.* at 13a, 49a-50a.

d. On November 16, 1992, a hearing on the July 1991 complaint commenced before an administrative law judge (ALJ). Pet. App. 14a, 40a-41a n.1. On that date, in response to a subpoena, petitioners produced a copy of the mutual aid pact for the first time. *Id.* at 14a, 48a, 50a. Shortly thereafter, on January 27, 1993, the General Counsel moved to amend the complaint. *Id.* at 14a; C.A. App. 104. The proposed amendment to the complaint alleged that the mutual aid pact, "which was concealed from the Union, was actually an agreement forming a de facto multi-employer association and/or bargaining coalition and * * * from March 27, 1990, the first negotiating session, [petitioners] bargained illegally as a multiemployer association or engaged in coalition bargaining, without the Union's consent." Pet. App. 14a, 50a (internal quotation marks omitted). Over petitioners' objection, the ALJ granted the General Counsel's motion to amend the complaint. *Ibid.*

2. a. After the hearing, the Board concluded that petitioners violated Section 8(a)(5) of the Act "by engaging in joint bargaining without the Union's knowledge or consent." Pet. App. 26a-29a; see also *id.* at 64a-85a. The Board explained that "[i]t is a violation of the statutory bargaining obligation for either a union or an employer to insist to impasse on a nonmandatory subject of bargaining, i.e., a subject that does not concern the terms and conditions of employment in the bargaining unit to which the employer's recognitional obligation extends." *Id.* at 27a-28a (citing *NLRB* v.

Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958)). The Board observed:

> Change in the scope of a bargaining unit is a nonmandatory subject. When either employers or unions which have in the past bargained in separate units begin, without the consent of the other side, to bargain jointly as if bargaining for a single contract, they are engaging in unlawful insistence on a nonmandatory subject. "Neither an employer nor a union is free to insist, as a condition of reaching an agreement in one unit, that the negotiations also include other units, or that the terms negotiated in the first unit be extended to other units."

Id. at 28a (quoting *Utility Workers Union, Local No. 111 (Ohio Power Co.)*, 203 N.L.R.B. 230, 238 (1973), enforced mem., 490 F.2d 1383 (6th Cir. 1974)). Applying these principles, the Board found that "the secret pact of the [petitioners] created a system, enforced by substantial financial penalties, by which the votes of the [c]ompanies outside a particular bargaining unit could block agreement on a contract by the bargaining parties in that unit." Pet. App. 28a.[2] The Board rejected, as inconsistent with "the credited evidence," petitioners' contention that "they were * * * engaged in lawful coordinated bargaining–i.e., each employer making its own entirely independent decision on contract terms,

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[2] The Board explained: "Because deviation from the [22 "minimum"] objectives [in the pact] could be achieved only by a majority vote, three [c]ompanies could veto another company's contract, and enforce this veto with the agreed-on financial penalty. By entering into the pact, therefore, each [c]ompany effectively lost its freedom to make the ultimate decision regarding provisions of its contract with the Union, ceding that decision to the other [c]ompanies as a group." Pet. App. 27a.

although coordinating its negotiations with the other employers." *Id.* at 26a.[3]

Because "the bargaining was unlawful from its inception," the Board concluded that "all subsequent unilateral implementations of the [petitioners'] offers were unlawful and must be rescinded." Pet. App. 29a. The Board therefore ordered petitioners, among other things, to "[r]escind the entire February 7, 1991 implementation," and to "[m]ake all unit employees whole for any loss of wages and benefits they may have suffered as a result of the unlawful changes." *Id.* at 31a.

b. The Board further rejected petitioners' contention that the amendment to the complaint alleging unlawful joint bargaining was time-barred by Section 10(b) of the Act, 29 U.S.C. 160(b).[4] Pet. App. 29a-30a; see also *id.* at 50a-56a. The Board found that the amendment was timely because it was "closely related to the [Union's] charge allegation of unilateral implementation before impasse (which became a part of the complaint)." *Id.* at 29a. The Board explained that "the joint bargaining allegation is of the same class of violation in that it concerns negotiating conduct governed by Section 8(a)(5) of the Act; it involves the same factual setting and sequence of events, in that all the theories call for analysis of the entire course of bargaining; and

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[3] In contrast to joint bargaining, "coordinated bargaining" is a lawful practice whereby "parties share information and coordinate efforts but ultimately retain the authority to negotiate contract terms individually." Pet. App. 16a. See, *e.g.*, *General Elec. Co.* v. *NLRB*, 412 F.2d 512 (2d Cir. 1969).

[4] Section 10(b) provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. 160(b).

the [petitioners] raised virtually the same defenses." *Ibid.*

The Board also found that "the amendment was appropriate for the additional reason that the [petitioners'] fraudulent concealment of the existence of the pact tolled the [Section] 10(b) period." Pet. App. 30a. The Board, by adopting the ALJ's findings (*id.* at 25a), explained that, "for 16 months, until July 12, 1991, and even as late as July 6, 1992, when Long wrote to the Office of Appeals, [petitioners] concealed the existence of the pact." *Id.* at 55a. The Board further explained that, "even if [petitioners] had somehow hinted at the existence of the pact * * * Long and his cohorts certainly never gave any clue about its contents. The Union never knew, nor did the General Counsel." *Ibid.* The Board added:

> No one knew that the pact prohibited each of [petitioners] from bargaining directly with the Union or agreeing to terms and conditions which did not meet the minimums. No one knew that, if one [c]ompany strayed from what the others wanted, it subjected itself to damages of at least $1,600,000. * * * And no one knew that Long's letter to the Office of Appeals misstated that the pact did not "restrict" [petitioners'] bargaining and that the pact related only to "sharing costs to pay [for] negotiations [and] security protection if a strike occurred."

Id. at 55a-56a.

3. The court of appeals enforced the Board's order. Pet. App. 1a-23a. The court found that, "[o]n this record, there is at least substantial evidence—we would be more likely to call it overwhelming evidence—that the [petitioners] were engaged in unlawful multiemployer bargaining without the Union's consent." *Id.*

at 18a.[5] The court rejected petitioners' contention that "the Pact * * * reflected only an innocent coordinated-bargaining strategy." *Id.* at 17a-18a.

On the Section 10(b) issue, the court concluded that "the NLRB has shown substantial evidence" that the joint-bargaining amendment to the complaint was "closely related" to the Union's April 3, 1991 charge alleging that petitioners unilaterally implemented new employment terms before a bargaining impasse. Pet. App. 20a-21a. The court also concluded that "the facts could scarcely be stronger in support of the NLRB's finding" that the "[petitioners] fraudulently concealed the terms of the Pact." *Id.* at 21a. The court found that "[t]he Union repeatedly asked about the existence of a mutual aid pact, beginning with the very first collective bargaining session," but that "[t]he [d]istributors' responses were generally evasive * * * and were sometimes downright untruthful." *Ibid.*

The court further concluded that, "[e]ven were we inclined to accept the [petitioners'] argument that the Union was on notice of the *existence* of some agreement, the record makes absolutely plain that the [petitioners] kept the *terms* of the Pact a closely-held secret." Pet. App. 21a. The court explained that "the Union had no way to ascertain whether the Pact provided for lawful coordinated bargaining or unlawful multiemployer bargaining without knowing its precise terms." *Id.* at 22a; see also *id.* at 10a-11a n.3. The court observed:

> Not only did the [d]istributors go so far as to ignore a subpoena in another proceeding demanding pro-

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[5] The court of appeals used the term "multiemployer bargaining" as a synonym for "joint bargaining," which was the term used by the Board in its decision. See Pet. App. 16a.

> duction of a copy of the Pact, but Long and his associates flagrantly misrepresented the Pact's terms—going so far as to say, for example, that there was no penalty to any [d]istributor for negotiating directly with the Union, or for using a negotiator other than West Coast * * * when the Pact clearly prohibited such acts on pain of a substantial financial penalty.

Id. at 21a-22a. "In the face of these facts," the court rejected, as "border[ing] on the disingenuous," petitioners' argument that "[t]he Union and the General Counsel failed to exercise due diligence." *Id.* at 22a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Contrary to petitioners' contention, this case does not ultimately present "the question of whether the 'fraudulent concealment' exception to Section 10(b) is limited to instances in which a charging party exercises reasonable diligence in its own behalf" (Pet. 11-12). Instead, as petitioners indirectly acknowledge (Pet. 9-10), and as the court of appeals expressly held (Pet. App. 20a-21a), the amended complaint was timely regardless of fraudulent concealment because "it was closely related to the original charge's allegation of unilateral implementation of employment conditions before a bona fide impasse was reached" (*id.* at 20a).

The fraudulent concealment doctrine was only an alternative basis for the holding of the court of appeals that the joint-bargaining allegation of the unfair labor practice complaint was timely under Section 10(b) of the Act. The court of appeals (like the Board) expressly

found that the joint-bargaining allegation was timely under Section 10(b) because it was "closely related" to the charge that petitioners unilaterally implemented new employment terms prior to an impasse in bargaining. Pet. App. 19a-22a, 29a-30a. Petitioners state that they "do not challenge this holding" (Pet. 10) and do not present this "closely related" issue as a question for review (see Pet. i).[6] Since this alternative, independent ground for the decision below is not challenged here, further review is not warranted because a judgment of this Court on the fraudulent concealment issue would not alter the ultimate disposition of this case. This Court sits "to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)).

2. In any event, petitioners err in contending that the court of appeals has reformulated the fraudulent concealment doctrine.

a. Generally speaking, "[r]ead into every federal statute of limitations * * * is the equitable doctrine that in case of defendant's fraud or deliberate con-

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[6] Despite that express disclaimer, petitioners suggest (Pet. 10) that "the closely related doctrine does not justify the decision below." That is so, petitioners argue (Pet. 10 n.5), because the Board failed to address whether the joint-bargaining allegation was based on conduct that occurred within the six-month period prior to April 3, 1991, the date of the Union's charge. There is no merit to that suggestion. A complaint amendment that is otherwise closely related to a timely-filed charge must also be based on conduct that occurred within six months of that charge. Pet. App. 19a; see also *Redd-I, Inc.*, 290 N.L.R.B. 1115, 1115 (1988). That requirement was satisfied in this case. As the court of appeals noted, "[i]t is undisputed that the alleged unfair labor practice of bargaining without disclosing the terms of a multiemployer-bargaining agreement occurred within six months of the date on which the original charge was filed." Pet. App. 20a.

cealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit." *Fitzgerald* v. *Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977). The Sixth Circuit also has held, consistent with the decisions of other circuits (see Pet. 14-15), that under the fraudulent concealment doctrine, "a plaintiff must prove '* * * plaintiff's due diligence until discovery of the facts.'" *Hill* v. *United States Dep't of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995) (quoting *Dayco Corp.* v. *Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975)).[7] Applying that established principle here, the court correctly held that there was no plausible basis in this record for finding that the Union had failed to exercise due diligence in seeking to discover the terms of the mutual aid pact. See Pet. App. 22a (finding that such a claim "borders on

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[7] The Sixth Circuit's explication of the reasonable diligence principle does not differ from that of the other courts cited by petitioner (Pet. 14-15). See, *e.g.*, *IAM, Dist. Lodge 64* v. *NLRB*, 50 F.3d 1088, 1092 (D.C. Cir. 1995) ("'[D]eliberate concealment of *material* facts' tolls the statute until the plaintiff discovers or with due diligence should have discovered the basis of the lawsuit.") (quoting *District Lodge 64, IAM* v. *NLRB*, 949 F.2d 441, 449 (D.C. Cir. 1991)); *Truck Drivers & Helpers Union, Local No. 170* v. *NLRB*, 993 F.2d 990, 998 (1st Cir. 1993) (Board acts reasonably in "plac[ing] the burden of proving the exercise of due diligence in discovering the fraud on the party seeking to toll the statute of limitations"); *Landry* v. *Air Line Pilots Ass'n Int'l*, 901 F.2d 404, 412-413 (5th Cir.) (plaintiffs have "obligation to exercise reasonable diligence to discover frauds perpetrated against them once they are on notice that such acts might have occurred"), cert. denied, 498 U.S. 895 (1990); *NLRB* v. *O'Neill*, 965 F.2d 1522, 1527 (9th Cir. 1992) ("[A] party who wishes to invoke the doctrine of fraudulent concealment must establish * * * the exercise of due diligence on his part."), cert. denied, 509 U.S. 904 (1993).

the disingenuous" given that "Long and his associates flagrantly misrepresented the Pact's terms").[8] The court did not establish a "new standard" (Pet. 15) that eliminated the need to exercise due diligence; instead, it considered the due diligence requirement and concluded that the Union had met its burden.

b. Stripped of its erroneous premise that the court of appeals reformulated the fraudulent concealment doctrine, petitioners' argument is merely a claim that, on the evidentiary record in this case, the Union failed to exercise due diligence. See Pet. 15-16, 18. According to petitioners (*ibid.*), the Union knew, no later than June or July 1991, that petitioners had entered into an agreement that called for unlawful joint bargaining. That fact-bound contention, which was rejected by the court of appeals, raises no issue warranting further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Moreover, petitioners' factual contention lacks merit. As the court of appeals explained, "the disclosure of the *existence* of the Pact is immaterial to the legality of [petitioners'] conduct"; rather, "the question is whether the [d]istributors disclosed the *terms* of the Pact," because "an agreement providing for coordinated bargaining is perfectly lawful, while one that provides for multiemployer bargaining without the Union's consent is a violation of the NLRA." Pet. App. 10a-11a n.3; see also *id.* at 22a. The court found that "[t]he record

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[8] While petitioners claim (Pet. 12) that the court established a rule that "an early concealment excuses later inaction without regard to the aggrieved party's actual state of knowledge or diligence in pursuing its rights," no such statement appears in the court's decision, nor is it reasonable to infer such a rule from the court's decision.

makes absolutely plain that the [d]istributors kept the *terms* of the Pact a closely-held secret." *Id.* at 21a. As of June or July 1991, the Union was operating under the misrepresentation, made by Long in March 1990, that petitioners had not pledged to negotiate exclusively through him and could "retain someone else without penalty." *Id.* at 7a, 56a-57a. At no time did petitioners disabuse the Union of Long's misrepresentations; in fact, they affirmatively reinforced those misrepresentations.[9] As the Board found, "[n]o one knew that the pact prohibited each of [petitioners] from bargaining directly with the Union or agreeing to terms and conditions which did not meet the minimums," and "[n]o one knew that, if one [c]ompany strayed from what the others wanted, it subjected itself to damages of at least $1,600,000." *Id.* at 55a-56a. Indeed, in July 1992, Long continued to perpetuate his misrepresentations by advising the Board's Office of Appeals that the pact was solely for the purpose of sharing the cost of negotiations and contained no provision that would "restrict [the individual distributors'] bargaining." *Id.* at 13a; see also *id.* at 56a.

Petitioners argue (Pet. 15, 18) that a passage from Union president Knox's testimony shows that, by June or July 1991, he knew that petitioners had entered into an agreement that called for unlawful joint bargaining.

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[9] For example, at the May 22, 1990 bargaining session, Long, in response to the Union's query, misleadingly suggested that "certain [d]istributors could well end up agreeing to different contract terms." At the September 22, 1990 bargaining session, officials of two distributors, in response to the Union's query as to whether petitioners had entered into an agreement "that binds you distributors together in any way," falsely stated that petitioners had not entered into any kind of pact whatsoever. See pp. 4-5, *supra*.

That argument is unpersuasive. In the cited passage, Knox testified:

> And it was very clear to me that they just could not make the decision for themselves. They were, in fact, you know—well, marching in lock step really because Cris Thomas kept saying they all wanted—they had the same everything else and we were getting no place with them. So I figured that they had to have some sort of document that bound them together. *And we wanted to know what the conditions were* so we could try to formulate our negotiations and create something.

Pet. App. 122a (emphasis added). Knox's testimony thus makes clear that he did not know, yet sought to discover, the actual terms of an agreement that appeared to him to "b[ind] [petitioners] together." When the Union asked Thomas for a copy of the pact at the July 12, 1991 meeting, he refused the request (*id.* at 10a), and Long continued to misrepresent its provisions (*id.* at 13a).[10] Because petitioners did not reveal the actual provisions of the pact until November 1992, the joint-bargaining allegation of the complaint was timely under Section 10(b) because the complaint was

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[10] Contrary to petitioners' suggestion (Pet. 18), on July 12, 1991, Thomas did not "confirm" that a pact containing terms indicative of illegal joint bargaining existed. Instead, he simply refused to produce a copy of the pact. Pet. App. 10a, 54a-55a. There is also no merit to petitioners' suggestion (Pet. 16) that, had the Union been diligent in June or July 1991, it would have asked the General Counsel to subpoena the pact. Since petitioners had earlier ignored a subpoena for the pact in a related Board proceeding (Pet. App. 21a-22a, 54a n.5), the Union could have reasonably concluded that a further subpoena would be a futile gesture in light of Thomas' assertion that the agreement was protected by attorney-client privilege. *Id.* at 10a.

amended to add that allegation less than six months later, in March 1993.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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